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Supreme Court of the United States

OCTOBER TERM, 19....

No. 642

SAMUEL J. ZUSMANN, SR., Trustee in Bankruptcy for WALTER R. THOMAS, ATHENS, INC., ET AL., Bankrupt,

Petitioner,

versus

NATIONAL ACCEPTANCE COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

LIPSHUTZ, MACEY, ZUSMANN & SIKES,
By MORRIS W. MACEY,
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NATIONAL ACCEPTANCE COMPANY,

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Samuel J. Zusmann, Sr., as Trustee in Bankruptcy of Walter R. Thomas, Athens, Inc., Walter R. Thomas, Inc., Walter R. Thomas & Associates, Inc., Myron E. Freeman & Brothers Co., Inc., and Atlanta Wholesale Jewelry Co., Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on June 23, 1967.

OPINIONS BELOW.

The opinion of the Referee in Bankruptcy, District Court for the Northern District of Georgia and the opinion on review of the District Court for the Northern District of Georgia are not reported. Copies thereof are appended to this petition in Appendix A & B at pp. 13 and 21. The opinion of the Court of Appeals for the Fifth Circuit was not reported at the time of writing this petition, but copies thereof are appended to this petition in Appendix C at p. 26.

JURISDICTION.

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on June 23, 1967, and copies thereof are appended to this petition in Appendix C at p. 33. The jurisdiction of this Court is invoked under 11 U.S.C. § 47C (Bankruptcy Act, §.24).

QUESTION PRESENTED.

The question presented is whether respondent, a secured creditor, may recover, in addition to its principal and interest in full, which amounts to approximately $380,000.00, the additional sum of $38,687.51 under the guise of attorney's fees simply because its promissory notes and security agreements contain provisions for such fees and because *Georgia Code 20-506* defines reasonable fees to be fifteen per cent of the first $500.00 and ten per cent of the excess of the obligation.

The allowance of $38,687.51 is not related to the value of the services rendered by the attorney, nor to the time spent on the case. It is arbitrarily allowed based on arithmatical computations set by the Georgia statute.

As the claim is proved as part of the creditor's claim and not as a separate claim of the attorney, there can be no assurance that the amount allowed reaches the attorney and it is possible that such an arbitrary award could result in a windfall to a creditor.

All that is required under the Georgia statute to be entitled to apply the statutory arithmatical formula is to give written notice of intention to collect such fee. In these cases, as in many bankruptcy proceedings, such a fee will consume a substantial portion of the assets to the detriment of taxing authorities and general creditors.

A further question is presented as to whether there was compliance with the Georgia statute since no written notice was ever given by counsel for respondent to the Receiver or Trustee.

Still a further question is whether the Circuit Court properly interpreted the provisions for attorney fees in the notes and security agreements as coming within the purview of the statute.

All of the questions, however, eventually resolve into whether a secured creditor can obtain from the

equity in the collateral he holds, after payment of his principal and interest, an additional amount based on a statutory formula, which might, as in these cases, preclude payment in full of tax claims and prevent any distribution whatsoever to unsecured creditors.

STATUTES INVOLVED.

Georgia Code 20-506, Georgia Code 28-405 and 11 U.S.C. § 11(a)(2) Bankruptcy Act Section 2a(2) as set forth in Appendix D at p. 35.

STATEMENT OF THE CASE.

All of the assets of these bankruptcy estates were encumbered by a security agreement of respondent. From the sale of these assets, sufficient funds were realized to pay respondent's principal and interest of approximately $380,000.00, which the Referee allowed. Additional funds were realized from the sale of these assets from which respondent claimed attorneys fees and respondent maintained that these attorneys fees were in the amount of $38,687.51 which is the amount obtained by taking 15% of the first $500 and 10% of the excess of principal and interest, which is the amount fixed by *Georgia Code 20-506* for reasonable attorneys fees. The Referee disallowed this amount and ruled that the Georgia Code established only a maximum attorney's fee and that the court had the equitable power to set a reasonable attorney's fee. The District Court affirmed the Referee and the Circuit Court of Appeals reversed asserting that the court was bound by the Georgia Code in setting the

attorney's fees for the respondent's attorney. The Circuit Court failed to consider as relevant the value of the services rendered by respondent's attorney, the amount of time expended by him on this case, and further, failed to take into account the fact that by allowing this windfall as attorney's fees that some of the taxes might go unpaid and that unsecured creditors would in all probability receive no dividends whatsoever.

The Circuit Court also ignored the fact that there was no compliance with the Georgia Code Section which states that written notice must be given to the party sought to be held for payment of the attorneys fees. In this case that party was the Receiver and subsequently the Trustee in Bankruptcy. No written notice was ever given to him. (R. 17.)

The Circuit Court also treated the respondent better in the bankruptcy court than respondent would have been treated in the Georgia Courts for in Georgia, once a Receivership action is filed, Georgia courts hold that the required statutory notice cannot be perfected. *Georgia Code 28-405.*

On April 8, 1964 Walter R. Thomas, Inc. and the other four interrelated corporations instituted proceedings under Chapter XI of the Bankruptcy Act. Petitioner was appointed Receiver of the corporations the following day; all corporations were adjudicated bankrupts on May 11, 1964, and petitioner was subsequently elected trustee.

In 1963 the corporations entered into financing agreements with respondent, executing promissory notes and security agreements, the pertinent provisions of which are:

Promissory Note.

If the holder hereof shall incur or pay. . . any attorney's fees by reason of the employment of counsel for advice, counsel or other legal services, . . . such . . .attorney's fees. . .shall be and is hereby made a further charge and lien upon the collateral pledged hereunder.

Chattel Mortgage Security Agreement.

If Mortgagee shall incur or pay any expenses . . .or attorney's fees by reason of the employment of counsel for counsel or advice with respect to this mortgage or the indebtedness secured hereby, . . . such expenses and reasonable attorney's fees. . . shall be and is hereby made a further charge and lien upon the mortgaged property.

On April 3, 1964 respondent declared the obligations in default and gave notice to the corporations of intention to collect attorney's fees, as provided by *Georgia Code 20-506*. Under this statute the debtor has ten days to pay the obligation without liability for the attorney's fees. The bankruptcy proceedings were filed before the ten day period had run. Although petitioner, as Receiver, was orally informed of the ten day notice, no written notice was given to petitioner, as prescribed by *Georgia Code 20-506*.

On appeal the five bankruptcy proceedings were consolidated and are so treated here.

The Circuit Court's decision creates an unconscionable result and is in conflict with the decisions of the Georgia Courts and of other Circuits. To allow respondents under the guise of attorneys fees $38,687.51 would be to pay their attorneys far more than they could expect to get in private litigation and would penalize the creditors of these estates.

Since just about all mortgages contain such an attorney's fee provision, such a decision would result in the puffing of all secured claims by an arbitrary percentage amount and create the inequitable result of windfalls for secured creditors and a further dilution of money available for unsecured creditors.

REASONS FOR GRANTING THE WRIT.

1. It is axiomatic that the bankruptcy court has the power to review fees for attorneys for petitioning creditors, bankrupts, Receivers, and Trustees. In reviewing these fees, the court is not bound by statistics or by any other arbitrary rules, *Jacobowitz v. Double Seven Corporation*, 378 F.2d 405 (9th Cir. 1967), but applies the usual fair standards. It would be repugnant to the principles of the bankruptcy act to apply a different standard for attorneys for secured creditors who appear in bankruptcy proceedings and to hold that their fees are determined by the provisions of a security agreement which alludes to

a state statute, thereby establishing immunity from judicial review. This is the effect of the decision of the Fifth Circuit; it decides an important point of bankruptcy law which has never before been decided by this court.

2. Attorneys fees for secured creditors should be determined by the usual standards, viz, time expended, skill employed, results accomplished, and the standing of the attorney at the bar. The court should have the authority to inquire into the reasonableness of such fees in bankruptcy, and not be precluded simply because of a state statute.

3. It would be a harsh and inequitable result to the unsecured creditors in a bankruptcy proceeding if secured creditors were permitted to tack on to their principal and interest an additional 15% on the first $500 and 10% on the balance of their debt under the guise of attorney's fees as provided by a state statute. Dividends would be diluted and secured creditors would receive a windfall available only in bankruptcy. In *Bank of Marin v. England*, 87 S.Ct. 274 (1966) the court held that to achieve an equitable and fair result the court would not read a statute "with the ease of a computer".

4. The Circuit Court misinterpreted *Security Mortgage Company v. Powers*, 278 U.S. 149, 74 L.Ed. 236 (1928). In *Security*, the issue presented was whether a secured creditor's claim for attorney's fees was a provable and allowable claim in a bankruptcy pro-

ceeding, and, if so, whether it would be accorded the same secured status as the principal claim. No issue was presented as to the method for determining the amount for which attorneys fees would be allowed. The Circuit Court believed that *Security* compelled it to apply *Georgia Code 20-506* in computing the amount of attorneys fees to the exclusion of all other considerations.

5. The holding of the Fifth Circuit is in conflict with the bankruptcy objective of equity in distribution of assets of bankruptcy estates. The power of judicial review of fees is essential to accomplish this objective. *Collier on Bankruptcy,* Vol. 3, ¶63.15, p. 1850. The decision is also in conflict with the holding of this Court, *Local Loan Co. v. Hunt,* 292 U.S. 234, 54 S.Ct. 695 (1934) that state statutes must yield where necessary to achieve equity in a bankruptcy proceeding. *11 U.S.C. § 11a (2).*

6. The decision of the Fifth Circuit is not limited in its applicability to administration of bankruptcy estates only in Georgia, but affects administration in every state in which parties may enforce a claim for attorney's fees. The decision affirms the validity of per cent provisions, regardless of their reasonable ness and removes all judicial review of such provisions.

7. The decision is in conflict with decisions of the Third and Eighth Circuits, *Mechanics American National Bank v. Coleman,* 204 Fed. 24 (8th Cir. 1913)

and *McCabe v. Patton*, 174 Fed. 217 (3rd Cir. 1909), holding that per cent provisions constitute only a maximum limit, and that the courts have the right to determine what is a reasonable fee in relation to the services rendered. The decision is also in conflict with a Tenth Circuit decision, *Webster Drilling Company v. Walker*, 286 F. 2d 114 (10th Cir. 1961) holding that a stipulated percent is at most a prima facie indication of the sum to be recovered, but if excessive or unreasonable should be reduced by the Court.

8. The decision of the Court below is in conflict with the *Security* decision. It held that provability of a claim for attorney's fees was dependent upon state law. Georgia law prohibits the ripening of a claim for attorney's fees after commencement of a receivership proceeding. *Georgia Code 28-405; Strickland v. Williams*, 215 Ga. 175, 109 S.E.2d 761 (1959). The analogy of a state receivership proceeding to a federal bankruptcy proceeding requires no elaboration. Further, the Georgia statute regarding attorneys' fees; *Georgia Code 20-506*, requires *written* notice to the party sought to be held, in this instance the bankruptcy estate. Failure to comply strictly with the statute requires disallowance of the claim. *Adair Realty & Loan Company v. Williams Brothers Lumber Co., et al.*, 112 Ga. App. 16, 143 S.E. 2d 577 (1965). In upholding the claim of respondent the Fifth Circuit departed from the holding in *Security*.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for a writ or certiorari should be granted.

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MORRIS W. MACEY,
LIPSHUTZ, MACEY,
ZUSMANN & SIKES,
Attorneys for Petitioner.

CERTIFICATE OF SERVICE.

I, Morris W. Macey, of counsel for appellee in the above entitled action, hereby certify that on the .... day of ...., 1967, I served the attached petition for petitioner upon Harmon & Thackston, counsel for respondent, 1944 National Bank of Georgia Building, Atlanta, Georgia, by depositing a copy in the United States mail, postpaid and properly addressed to their offices.

....

MORRIS W. MACEY.